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DISCUSSION

Research questions arising from practice of law

LEONIE VIERCK — MARKUS BÖCKENFÖRDE — 4 December, 2015

Communicating between the spheres of research and practice

So, how do you actually select what you are researching? Obviously, personal motivation is a key factor in this process (not least because you will need considerable motivation to sustain yourself while writing an entire book or series of papers). Neglecting this aspect for the moment, we turn our attention to another key trigger for research question selection and the focus of this article. We argue that some of the best research questions arise from the practice of law. In public international law, this especially concerns the more neglected fields of international institutions, bilateral

relations, and the public consultancy sector (including technical assistance, and comparative legal advisory services). In order to illustrate our point, we picked two examples from our own practical experiences.

Our aim is not to call for lifting the boundaries between research and practice. Of course practice is not the only method for framing possible research questions. The claim presented here is a relative one, then, leaning more towards a "*Don't dismiss practice too early or too easily!*". Practice can form an important source of inspiration, especially if you are dealing with avant-garde research. It can help you to structure your thinking in a way so as to respond to real-life needs, which can create meaning for your work. Of course, it is necessary to balance both spheres. We are convinced that a structured oscillation, drawing from each sphere where it makes sense, can be a fruitful exercise.

To an extent, these claims might be obvious. However, public international law and comparative public law research know of concrete case studies, but rarely exchange on an equal and regular basis with counterparts from practice. International administrations (with the exception of international courts, of course) often involve few legal staff in project management processes, and themselves have limited legal experience. We submit that public international law research should follow other disciplines in this respect, or even the structured networking within domestic and supra-national legal arenas.

Drawing from our own practical experience, we would like to give two concrete examples of a fruitful exchange between practice and research.

(1) Rule of law promotion:

The first one is an example of how very real-life power politics can suddenly capture constitutional theory, which in turn requires adequate responses of constitutional design. In the context of drafting a constitution in a time of political rupture that erases the old and creates the new, some 200 years ago Sieyès conceptualized the distinction between the *pouvoir constituant* and the *pouvoirs constitués*: the former, the original constituent power, generates the latter, the derived constituent powers in the form of constitutional entities or institutions. It implies that the institutions established by the constitution are not at liberty to take the place of the original constituent power which could only be the "people" acting as a nation. And if the constitution had to be amended through institutions that were created by it, these institutions are bound by such limitations as the constitution had initially set out. They come in the form of procedural entrenchments and immutable clauses. The latter cannot be subject to any constitutional amendment. Occasionally referred to as eternity clauses, they are indeed eternal from the perspective of the *pouvoirs constitués*, though not from that of the *pouvoir constituant*.

These aspects of constitutional theory triggered some interesting dynamics in Africa, a continent that has been plagued by imperial presidency. In the course of post-1990 constitutional reforms throughout sub-Saharan Africa, the introduction of presidential term limits has been an attempt to end "perpetual incumbency". Over the years, it almost became a norm in modern African constitutions (by the end of 2005, thirty-three African constitutions contained presidential term limit provisions). Occasionally, the instrument served its purpose and term limits ended the

tenure of several presidents. More often, presidents attempted to drop respective provisions through a constitutional amendment. There had been no other single constitutional provision over the past decade in Africa that was supposed to be amended/dropped that often. The success rate often depended on the extent to which the "big man" controlled political life, the legislature, the opposition, etc.

Against this experience, some constitutions entrenched the provision on term limits, rendering it immutable (Niger (Art. 136), Democratic Republic of Congo (DRC) (Art. 178), Mauritania (Art. 99 para. 3), recently Tunisia (Art. 75 para. 6). The lifetime of eternity was tested in Niger in 2009, when President Tandja intended to run for a third term. Being prevented from using a *pouvoir constitué* to amend the constitution accordingly, Tandja attempted to activate the *pouvoir constituant*. He created a committee to draft a new constitution without term limits and with an extension of its current term by three years that – based on a presidential decree – should be approved by the people through referendum (in the end, a military coup ended his endeavours to stay in power). A similar dynamic might be witnessed in the DRC where Kabila also needs to overcome the unamendable constitutional provision of presidential term limit in order to run for re-election in 2016.

The source of inspiration for academic discourse is obvious: How tangible can/should the *pouvoir constituant* be perceived and how encapsulated does it need to be? What might prevent "big men" from calling for a new constitution in their country if the constitution is silent? How does one design a constitution that coherently prevents presidential manoeuvres to overcome term limits through taking

recourse to the "*pouvoir constituant*"? This is a great example of how constitutional practice can shape constitutional thought, and how the interaction between these two layers can be observed.

(2) *Development aid:*

Our second example stems from the area of development aid where knowledge transfer by international specialists plays a crucial role. While there are traditionally strong ties with evidence creation in natural sciences due to the technical nature of this work, links to social sciences and humanities are not commonly thought of.

In this area, evidence-based implementation is a key tool in project programming for impact. This is reflected on the policy level by the aid effectiveness agenda of the OECD Development Assistance Committee (DAC). While governance plays an important role within development programs, the governance of the development aid system itself is not yet a natural theme (of course there exist notable exceptions, e.g. the research grant funded by the Volkswagen Foundation on law and governance of development corporation currently hosted by Berlin's Humboldt University (see the German webpage here), the German Development Institute (GDI) or, from a theoretical perspective, the theory of Global Administrative Law (GAL) or International Public Authority of Law (IPA), to just name a few examples). Here, human rights standards are a good example. Political guidance still often strongly sticks to human rights treaties and their according interpretation, as we know them from classical public international law scholarship. Yet, in practice they are easily infused with soft law such as the Millennium Development Goals (MDG)

process, (see pp. 9-11 of the German human rights strategy in development aid) which is now being replaced by the new sustainable development goals (SDGs). This renders soft law powerful in bilateral administrative practice: we can observe a trickle-down effect from the policy level to project programming, and according decisions. Turning to concrete implementation, the field is often defined by human rights activism of non-governmental organisations (NGO's). Here, political claims often substitute adherence to legal standards. Obviously, NGO influence is by no means a phenomenon that is as such disregarded by international legal scholarship (in Germany). Yet we rarely look at concrete normative influences on international administrative action, and how they potentially (re)shape the understanding of the legal standards.

To conclude, these are dynamic, and not static examples. As opposed to empirical descriptions of singled-out linear relationships between cause and result (as applied in natural science methodology), normative system descriptions can entail an element of inter-dependence between theory and practice. In our example on rule of law promotion, you can clearly see how constitutional theory explains pure power politics. In the case of human rights in development aid, it is fairly easy to dismiss an on-the-ground equation of human rights with political claims because formally, they have nothing to do with their original legal meaning. However, a different attitude can produce interesting research questions, whether or not such practical understanding can be integrated into the normative understanding as well. In effect, this produces vice-versa benefits for both spheres.

Additionally, we propose these concrete recommendations based on our thoughts sketched above:

- **Create adequate forums**: In order to foster meaningful exchange between both spheres, we need forums for spontaneous as well as continuous exchange. Arguably, the German culture still treats these spheres as two separate, and sealed-off boxes. In the Anglo-Saxon culture, it is more common to engage in mutual exchange. The basis of such exchange must not be to abandon one's own point of view. On the contrary, knowing and understanding the other world can, by and large, enrich or even fortify it.
- **Make the research selection procedure transparent**: Whatever the particular focus you choose, make it transparent; readers and divergent audience can benefit from how you carve your own research perspective.
- **Walk the line**: While boundaries are necessary, be aware of the other world. That is basically a call for attitude that one can only develop personally.

Leonie *is a junior research fellow at the Max Planck Institute for Comparative Public Law and International Law (MPIL) in Heidelberg, Germany; prior to joining the MPIL she worked for over three years with the German bilateral development aid.*

Markus *was a co-founder of the MPIL initiative on Global Knowledge Transfer (2001) which was later transformed into the Max Planck Foundation for International Peace and the Rule of Law. On the African continent, he has been activly involved in Constitution Building Processes in Sudan, Somalia, Tunisia, and Libya; he is the co-author of International IDEA's Practical Guide to Constitutional Building that was translated into Arabic, Myanmar, and Vietnamese. Presently Markus is Executive Director of the Centre for Global Cooperation Research and Visiting Professor at the Central European University*

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